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3533/05
Filed on 22/9/05
by Shri Rajesh Kumar Jain Advocate

(2)

R to D.R. (J)
22/9/05

Single Bench

HONRABLE HIGH COURT OF JUDICATURE AT BILASPUR.

S.B.

Cri.Appeal No:- 801/05.

Appellant:-

(In jail)

Kishore Bahadur .
S/o. Bheem Bahadur Nepali aged – 25 yrs. R/o. Gunjatala – P.S. Heerakunda, Distt- Sambal pur – Odissa .
at present R/o. – ShivNagar Roomguda – P.S.- Balco nagar – Distt- Korba. C.G.

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VERSUS.

Respondant :-

State of C.G.

CRIMINAL APPEAL

Memo of appeal under section- 374 of Cri. Pro. Code.

A.F.R.

(63)
(62)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.801/2005

Kishore Bahadur

Vs.

State of Chhattisgarh

Post for orders : 30.03.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.801/2005

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Kishore Bahadur

Versus

State of Chhattisgarh

Shri Abhay Tiwari, learned counsel for the appellant.

Shri Ashish Shukla, learned Govt. Advocate for the State/respondent.

JUDGMENT

(Delivered on 30th day of March, 2006)

This appeal is directed against the judgment dated 31.10.2002 delivered by Shri Lakhan Singh, learned Addl. Sessions Judge, Distt. Korba in Sessions Trial No. 478/2001 whereby the appellant was convicted under Sections 376, 366, 363 and 342 IPC and was sentenced to rigorous imprisonment for 7 years and to pay fine of Rs. 500/- under Section 376 IPC, to R.I. for 5 years and fine of Rs. 500/- under Section 366 IPC, to R.I. for 3 years and a fine of Rs. 500/- under Section 363 and to R.I. for 3 months under Section 342 IPC. In default of payment of fine, the appellant was sentenced to undergo S.I. for one month each for offences under Section 363, 366 and 376 IPC.

2. The prosecution story in brief is that the prosecutrix, aged about 17 years and 2 months and a student of Class-IX, left for her school on a cycle at about 10.15 a.m. from her house. Near Polytechnic College, by the side of the road, the appellant Kishore Bahadur along

with Ram Bhuvan lay in wait for her. Ram Bhuvan was driving the motorcycle while the appellant Kishore was the pillion rider. They blocked the way of the prosecutrix by parking the motorcycle in front of her cycle. The associates of appellant-Kishore i.e. Bhajan and Ramu also arrived on a cycle. Thereafter, the appellant Kishore forcibly seated the prosecutrix on the motorcycle and gagged her mouth. Ram Bhuvan drove the motorcycle towards the Jambahar forest. Leaving the appellant and the prosecutrix there, Ram Bhuvan returned. Thereafter, the appellant committed rape on the prosecutrix repeatedly on 16th, 17th and 18th of August, 2001 under constant threat. On 18.8.2001, Ram Bhuvan came to the forest on a motorcycle while Bhajan and Ramu came riding on the cycle. While the prosecutrix was being brought home, she fainted since she had not eaten anything for 3 days. The appellant left the prosecutrix at her home and went away. After regaining consciousness, the prosecutrix informed about the incident to her parents. The F.I.R. was lodged by the prosecutrix on 24.8.2001 i.e. after six days at about 8.05 p.m. at P.S. Balco situated about 4 kms. away from the place of occurrence.

3. The prosecutrix was sent for medical examination. Dr. Veena Agarwal P.W. 6 examined the prosecutrix on 25.8.2001 at 12.30 p.m. and found that there was no external injury on her person. On internal examination, she found that there were multiple tears in hymen membrane which were red, congested and tender. The vagina admitted one finger with pain. It was opined that sexual intercourse had been committed with the prosecutrix within 3 to 7 days prior to her examination. The age of the prosecutrix was opined to be between 16 and 17 years. Vaginal slides were prepared and sealed. Radiological examination was advised to confirm her age.

4. One black Suzuki motorcycle bearing No. MP 26 K-0143 was seized from Ram Bhuvan on 25.8.2001. One yellow coloured nylon underwear was seized from the prosecutrix on 25.8.2001 vide Ex.P.2. One brown coloured nylon underwear of the appellant was seized from him vide Ex.P-14 on 1.9.2001. Upon medical examination of the appellant, Dr. A.D. Kurena P.W. 8 opined that he was capable of performing sexual intercourse. The Forensic Science Laboratory's examination report, if any, of the vaginal slides and the underwear seized from the prosecutrix and the appellant was not filed by the prosecution. After completion of investigation, the appellant was prosecuted along with co-accused Ram Bhuvan, Ramu and Bhajan. Ramu and Bhajan were shown to be absconding. Ram Bhuvan was also declared absconding on 28.8.2002. The appellant was charged under Section 363, 366, 376 and 342 IPC by the learned Addl. Sessions Judge. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The learned trial Judge relying upon the evidence of the prosecutrix and the medical evidence, convicted and sentenced the appellant-Kishore Bahadur as shown in para 1 supra.

5. Shri Abhay Tiwari, learned counsel for the appellant has assailed the conviction of the appellant on the ground that the evidence led by the prosecution does not establish the guilt under Sections 363, 366, 376 and 342 IPC against the appellant. He contended that ossification test was not conducted to determine the age of the prosecutrix. It was also pointed out that the prosecutrix P.W. 1 had in para 9 of her testimony stated that she had mentioned her age as 17 years in the report Ex.P-1 by mere guess work. It was also argued that Narayan Sahu P.W. 2, father of the prosecutrix had in para 3 stated that age of the prosecutrix was about 16 - 17 years and he was not aware of the date of birth of the prosecutrix since

there was no record. On this material, it was argued that it could not be ruled out that the age of the prosecutrix on the date of the occurrence was more than 18 years. It was further contended that the prosecutrix P.W. 1 was a wholly unreliable witness and was not trustworthy since her testimony was highly exaggerated. It was also contended that the delay in lodging the F.I.R. was not explained satisfactorily. Neither the cycle of the prosecutrix was seized from where it was alleged to have been left on the date of occurrence, nor was her testimony that she was forcibly taken away to Jambahar forest by the appellant Kishore, reliable. Medical evidence of Dr. Veena Agarwal P.W. 6 did not corroborate the testimony of Smt Ram Bai P.W. 4 that when the appellant left the prosecutrix at home, she was drenched in blood. On these grounds, it was contended that it could not be ruled that the alleged sexual assault, if any, committed by the appellant was with the consent of the prosecutrix. On the other hand, Shri Ashish Shukla, learned Govt. Advocate argued in support of the impugned judgment.

6. Having heard the rival contentions, I have also perused the record of Sessions Trial No. 478/2001. It is not disputed that ossification test for determining the age of the prosecutrix was not conducted. Ex.P-2 is the seizure of the mark list of the prosecutrix showing her date of birth as 25.6.1984. However, the original mark sheet has not been proved by the prosecution. The entry in the Kotwari Register, which is the primary evidence relating to date of birth was not adduced by the prosecution. The prosecutrix had in para 9 of her testimony admitted that in the F.I.R. Ex.P-1, she had narrated her age as 17 years by sheer guess work. Narayan Sahu P.W. 2 father of the prosecutrix had also admitted in para 6 that he does

not know the exact date of birth of the prosecutrix, since there was no record available with him. Dr. Veena Agarwal P.W. 6 has also given a mere estimation of the age of the prosecutrix to be 16-17 years and stated that she had advised examination of the prosecutrix by the Radiologist for determination of her age. However, ossification test was not conducted. In the above mentioned circumstances, it cannot be ruled out that the age of the prosecutrix on the date of occurrence could have been 18 years or even more.

7. The prosecutrix P.W. 1 had stated in para 2 that while she was going to the school at about 10.30 a.m., the appellant came on a motorcycle and blocked her way due to which she fell down from the cycle. Thereafter, the appellant Kishore forcibly seated her on the motorcycle and took her to the Jambahar forest. She has admitted in para 19 that the road on which she was intercepted by the appellant is a public way and has thoroughfare. It was admitted by her that she did not shout while the appellant took her to the Jambahar forest. She did not state in her testimony that Ram Bhuvan was driving the motorcycle while the appellant Kishore had forcibly seated her on it. In fact, the prosecutrix did not depose anything against Ram Bhuvan in her testimony. It is thereby sharply contradicts her assertion in the F.I.R. Ex.P-1 that Ram Bhuvan had blocked her way on a motorcycle while the appellant Kishore was seated behind. Even though a specific question was asked to her in para 36 in this regard, she did not allege that Ram Bhuvan was driving the motorcycle. If, the appellant Kishore had taken the prosecutrix on his motorcycle to Jambahar forest, the prosecutrix had every opportunity to raise an alarm since it was a public way and it could not be possible for the

appellant Kishore to drive the motorcycle as also to gag her mouth with a handkerchief.

8. In para 3 of her testimony, the prosecutrix P.W. 1 had deposed that for 3 days, the appellant repeatedly committed rape on her for about 9 times. In para 24, she has stated that during this period of 3 days, she had nothing to eat but the appellant Kishore had brought water for her to drink. However, in para 23 again, the prosecutrix has admitted that while the appellant Kishore had gone to fetch water, she did not make any effort to run away. She volunteered that the appellant had tied her to a tree. However, she did not narrate any such thing in her statement under Section 161 Cr.P.C. In para 24 she stated that she could not say whether for three days in the jungle the appellant had slept or not. She deliberately did not answer since she would not be able to explain why she did not run away at night while the appellant was sleeping.

9. Ram Bai P.W. 4, the mother of the prosecutrix had deposed that after 3 days, the appellant had left the prosecutrix at her home and at that time the prosecutrix was drenched in blood. If what has been stated is true, then prompt F.I.R. would have been lodged by Narayan P.W. 2, father of the prosecutrix. The clothes of the prosecutrix drenched with blood would have been seized. Seizure memo Ex.P-2 also does not show that the under garments of the prosecutrix had any blood like stains on it. Not only this, the testimony of Dr. Veena Agarwal P.W. 6 also does not show that she had found any blood like stains on the prosecutrix. In para 24 of her testimony she has stated that at the time of occurrence she was

wearing a blue coloured Salwar suit. However, her clothes were not seized by the police.

10. The First Information Report about the occurrence was lodged by the prosecutrix on 24.8.2001 i.e. 6 days after the return of the prosecutrix to her house. The police station was situated at a distance of about 4 Kms. No satisfactory explanation is found in the testimony of the prosecutrix P.W. 1, Narayan P.W. 2 or Ram Bai P.W. 4 for the delay in lodging the F.I.R. Non-filing of the report of the F.S. L also justifies an adverse inference against the prosecution that the report of the F.S.L did not support the prosecution.

11. A plea was taken by the appellant in cross-examination that the prosecutrix was in love with the appellant Kishore and had eloped with him. Kotwar Sevaram P.W. 5 has stated that Narayan P.W. 2, father of the prosecutrix had informed him on the same night that his daughter had eloped with a boy. It clearly shows that Narayan P.W. 2 knew that his daughter had eloped with somebody explaining why he did not lodge F.I.R. In cross-examination para 11, Sevaram P.W. 5 has further admitted that Ram Bai P.W. 4, mother of the prosecutrix had told him that the prosecutrix was in love with a Nepali boy while she was opposed to their marriage. The fact that Narayan P.W. 2 knew that his daughter had eloped with the appellant renders the allegation in the F.I.R., that while the prosecutrix was going to the school on a cycle, she was intercepted by the appellant Kishore and was forcibly taken to the Jambahar forest, unreliable. If such assertion was correct, it is beyond comprehension why during investigation, the cycle of the prosecutrix was not seized from the place from where she was alleged to have been abducted. Similarly, if the prosecutrix

had fallen from the cycle on being intercepted by the appellant she would have sustained some injury. If she was tied with a rope to a tree there would have been linear abrasions on her body. If she had offered any resistance while being ravished nine times by the appellants in three days she would have sustained some external injuries on the back or thighs etc. If the prosecutrix had returned home, drenched with blood, her blue Salwar suit and underwear would have got stained with blood. The absence of any external injury or blood stains on her underwear and the non-seizure of her Salwar suit show that her testimony is highly exaggerated and fails to inspire confidence.

12. In para 27 of her testimony, the prosecutrix has stated that on her return with the appellant Kishore to her home, she did not inform anybody about the incident for a period of 2-3 days. This is sharply contradicted by Ram Bai P.W. 4 in para 1 by stating that appellant Kishore had brought the prosecutrix home while the prosecutrix was drenched in blood. In para 14, she further stated that the clothes of the prosecutrix were drenched in blood and she was unconscious for which she was treated by a Doctor. However, no such evidence has been adduced by the prosecution. It is also pertinent to note that although the prosecutrix was missing from her house from 16.8.2001, her parents did not lodge any report at the police station even after the expiry of six days after she returned with the appellant Kishore. The report was lodged after considerable delay i.e. on 24.8.2001. Considering the testimony of Kotwar Sevaram P.W. 5, it cannot be ruled out that Narayan P.W. 2, father of the prosecutrix, knew that the prosecutrix had eloped with the appellant. Age of the prosecutrix being possibly over 18 years, in the facts and circumstances of the case, the offences under Section 342, 363,

366 and 376 I.P.C. are not established against the appellant-Kishore Bahadur.

13. Having thus, considered the rival submissions, the following facts emerge:-

a. It cannot be ruled out that the age of the prosecutrix on the date of occurrence was 18 years or more.

b. The testimony of the prosecutrix that she was intercepted by the appellant Kishore on the road and was forcibly taken to the Jambahar forest on a motorcycle is unreliable. The testimony of the prosecutrix that she was repeatedly subjected to rape 9 times during 3 days is also unreliable since her testimony is not corroborated by medical evidence.

c. The testimony of the prosecutrix is highly exaggerated and is unworthy of credit.

d. It cannot be ruled out that the prosecutrix had eloped with the appellant of her own volition and had consented to the sexual intercourse by the appellant with her.

e. Long unexplained delay of six days in lodging the F.I.R. by the prosecutrix also renders her testimony unworthy of credit.

f. Non-production of the report of the FSL also renders an adverse inference being drawn against the prosecution.

g. Absence of any bloodstain on the underwear of the prosecutrix renders the testimony of the prosecutrix and her mother Ram Bai P.W.3 unworthy of credit.

14. In view of the above findings, the conviction of the appellant-Kishore Bahadur under Section 363, 366, 376 and 342 of IPC cannot be sustained in law. The appeal is allowed. Conviction of the appellant under Section 363, 366, 376 and 342 of IPC by the trial Court and the sentence awarded

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thereunder are set aside. The appellant shall be set at liberty forthwith, if not required in any other case. Fine if paid, shall be refunded to the appellant.

Priya

Sd/-
Dilip Raosaheb Deshmukh
Judge